No. 88-357

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1988

NORM MALENG, King County Prosecuting Attorney; AMOS E. REED, Secretary of the Washington State Department of Social & Health Services; KENNETH O. EIKENBERRY, Attorney General,

Petitioners,

v.

MARK EDWIN COOK,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONERS

KENNETH O. EIKENBERRY
Attorney General

JOHN M. JONES
Assistant Attorney General

WILLIAM L. WILLIAMS
Sr. Assistant Attorney General
Counsel of Record

Corrections Division
Mail Stop: FZ-11
Olympia, WA 98504
(206) 586-1445

STATE PRINTING PLANT — OLYMPIA, WASHINGTON

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ARGUMENT

A. Respondent's 1958 conviction has not been judicially invalidated.

In his Brief, Respondent refers to his 1958 conviction as though his allegations of constitutional error were admitted facts and the conviction therefore invalid. *See*, e.g. Brief of Respondent, p. 2. In fact the contrary is true — the 1958 conviction retains its validity. If this were not so, Respondent would not have filed this petition attempting to challenge that conviction.

Respondent's suggestion that his 1958 conviction has been declared invalid is based on a statement made by the prosecuting attorney in dismissing a 1977 habitual criminal proceeding. In such a proceeding, the burden is on the prosecutor to prove beyond a reasonable doubt the existence of at least two prior felony convictions as an essential element of the habitual criminal finding. RCW 9.92.090. *State v. Holsworth*, 93 Wn.2d 148, 159 (1980). The prosecutor's statement must be read in that context. There is a substantial difference between choosing not to go forward with a supplemental information based on a prior conviction and a judicial declaration that that prior conviction is invalid.[1]

In fact, in 1984, Respondent unsuccessfully sought a judicial declaration invalidating his 1958 conviction from the Washington Appellate Courts. J.A. 4, 5, 12-14. He filed a Personal Restraint Petition pursuant to Washington Rules of Appellate Procedure (RAP) 16.3-16.15, raising the precise competency issue he seeks to raise in this § 2254 proceeding. Finding that Mr. Cook had failed to show actual prejudice–arising out of an error of constitutional magnitude, the Washington Court of Appeals dismissed his Petition. Mr. Cook's Motion for Discretionary Review in the Washington Supreme Court was also denied. J.A. 12-14.

Thus Mr. Cook's 1958 conviction is valid, and the contrary suggestion in his Brief and those of amici is unwarranted.

B. Respondent's Section 2254 Petition Clearly Involves a Challenge Only To His 1958 Conviction, and Does Not Involve a Challenge to His 1978 Sentence.

In his Brief, Respondent suggests that his § 2254 Petition can be read to be a challenge to his 1978 sentence, not to his 1958 conviction, and that the jurisdictional issue in this

[1] "[T]he attack in an habitual criminal proceeding on the use of [a prior conviction] is neither collateral nor retroactive." *Holsworth*, 93 Wn.2d at 154, *see also State v. McKenzie*, 31 Wn.App. 450, 453-54. There is also a significant difference between use of a prior conviction in an habitual criminal proceeding — where the maximum term to which the offender may be subjected is actually increased (*see* RCW 9.92.090) — and its use under Washington's sentencing system to guide the discretionary sentencing decision. *See*, part B, pp. 4-5, *infra*.

case should be viewed as "an argument on mere form [with] no substantive importance." Brief of Respondent, p. 26. However, Mr. Cook's Petition is explicitly and unequivocally an attack upon his 1958 conviction:[2]

PETITION

1. Name and location of court which entered the judgment of conviction under attack Washington State Superior Court for King County at Seattle, Washington
2. Date of judgment of conviction May 7, 1958
3. Length of sentence Three 20-year terms running concurrently
4. Nature of offenses involved (all counts) Three counts of robbery

J.A. p. 3.

The only mention of his 1978 state sentence is in Ground two of Mr. Cook's Petition. J.A. p. 6. While its possible effect on his 1978 sentence apparently is the *reason* Mr. Cook wants to challenge his 1958 conviction, there is no question that it is the 1958 conviction being challenged.[3]

Further, both the District Court and the Court of Appeals dealt with Mr. Cook's Petition as a challenge to his 1958 conviction. Petition for Cert., Appendix A, B, and C. Respondent cannot now amend his Petition so as to fashion it as a challenge to his 1978 sentence.

If the Petition were construed as a challenge to the 1978 sentence, the central issue in the case would *not* be subject matter jurisdiction — Mr. Cook is admittedly "in custody" on the 1978 conviction under *Peyton v. Rowe*, 391 U.S. 54 (1968).

Rather, the question then presented would focus on the level of due process required in setting a discretionary mini-

[2] The § 2254 petition filed in this case was prepared on a "fill in the blank" printed form supplied by the district court. The underlined words in the quotation from the petition were typewritten into the blanks by Mr. Cook. The non-underlined words were pre-printed as part of the petition form.

[3] In Ground three of his petition, Mr. Cook raised the effect of his 1958 conviction on his 1976 federal sentence. J.A. p. 7. Thus if the allegations of Ground two converts his petition into one challenging his 1978 state sentence, Ground three must be read as raising a challenge to his 1976 federal sentence, something he clearly could not do under § 2254.

mum term within the statutory maximum sentence actually imposed.

Under Washington law applicable to Mr. Cook's 1978 conviction, he was sentenced to a maximum term of life imprisonment. He has no constitutionally protected right to release prior to the expiration of that statutory maximum, except as may be created by state law. *Greenholtz v. Inmates*, 442 U.S. 1 (1979).

The actual amount of time which will be served by Mr. Cook on his 1978 state conviction cannot be determined at this time.[4] Once he is returned to state custody, the Indeterminate Sentence Review Board will establish a minimum term of confinement, using the seriousness of the crime for which he was convicted and his criminal history information — including the 1958 conviction — to identify the applicable standard range.[5] RCW 9.94A, as made applicable by RCW 9.95.009(2). *See also, Addleman v. Board of Prison Terms & Paroles*, 107 Wn.2d 503 (1986).

The minimum term may be set at any point within the standard range, or outside the range — up to and including the maximum — if circumstances justify so doing.[6] Other factors, including the specifics of the crime, the recommendation of the prosecutor and sentencing judge, mitigating factors — "an amalgam of elements" in the words of *Greenholtz*, 442 U.S. at 10 — may also affect the minimum term of confinement eventually established for Mr. Cook's 1978 term.[7]

[4] Mr. Cook concedes as much. *See*, generally, Brief of Respondent, pp. 4-9, p. 27 n. 13. In framing the question presented in the Petition for Certiorari, Petitioners inadvertently used the wrong tense — "may have been used" instead of "may be used" — to describe the effect of Mr. Cook's 1958 conviction on his 1978 sentence. Petition for Certiorari, p. i. Changing the verb tense does not change the question before the Court: Whether Mr. Cook will ever again be "in custody" on that 1958 conviction since the maximum term has expired.

[5] As Mr. Cook points out, statutory requirements for mandatory minimum terms may also affect the setting of the minimum, unless waived or determined by the Board to be inapplicable. Brief of Respondent, p. 4-8. See especially p. 6, n 3, n 4; p. 8, n. 6, n. 7. Even so, the minimum term will be set somewhere within the maximum term to which Mr. Cook has been sentenced.

[6] Essentially the same process applies under the Washington Sentencing Reform Act, RCW 9.94A, applicable to crimes committed after July 1, 1984. Once convicted, the offender is subject to the statutory maximum for the crime of conviction. 9.94A.120(10). Criminal history and the seriousness of the crime itself determine the standard range, but a sentence may be set outside the range under certain circumstances. RCW 9.94A.120(2), (5), and (7). The major differences between the Sentencing Reform Act and the indeterminate sentencing system applicable to Mr. Cook are two-fold: (1) The Court makes the discretionary sentencing decision under the SRA, while the Board (or its successor, *see* RCW 9.95.001(1)) will eventually establish Mr. Cook's minimum term; (2) SRA sentences are determinate — once the term has been served, the offender is discharged pursuant to RCW 9.94A.220 — Mr. Cook, on the other hand, will be released prior to the expiration of his maximum term only if found parolable. RCW 9.95.100.

[7] Cf. *Lane v. Williams*, 455 U.S. 624 (1982). In this case, decided after *Carafas v. LaVallee*, 391 U.S. 234 (1968), the Court held that the fact that a parole violation might be considered in future criminal sentencing decisions was insufficient to prevent a habeas challenge to a parole term from becoming moot once the term had expired.

It is not only impossible to tell at this time what effect the 1958 conviction will have on Mr. Cook's minimum term — it may be impossible to tell at any time in the future. Yet, the possibility that the 1958 conviction might have an impact on the length of the 1978 minimum term certainly exists, for it too will be a part of the "amalgam of elements" that could come into play when it is time to determine that minimum term. What the Respondent is attempting to do in this proceeding, very simply, is to eliminate completely that element from the amalgam. An attack on the 1978 sentence, on the other hand, would focus on the process by which the amalgam is mixed.

Thus, if in fact the 1978 sentence were the subject matter of this proceeding, the issue before the Court would be significantly different. Therefore, Respondent's characterization of the jurisdictional issue as merely "technical" is highly misleading.

C. Respondent's Allegations That He Could Have Had Another Avenue of Relief, By Way of a Different Challenge to His 1978 Sentence, Are Irrelevant to the Definition of Custody in a § 2254 proceeding.

Respondent's assertions regarding the use of constitutionally infirm prior convictions in later criminal sentencings are irrelevant to the case at bar. The narrow issue before this Court involves the definition of custody, for purposes of § 2254 subject matter jurisdiction, and whether that definition should be expanded to include the potential collateral effect of a prior conviction the sentence for which has expired.

Respondent asserts there is a line of authority that pro-

hibits the use of constitutionally infirm prior convictions to enhance[5] sentences on a later conviction. Brief of Respondent, at p. 15. In support of this proposition, Respondents cite *Burgett v. Texas*, 389 U.S. 109 (1967); *United States v. Tucker*, 404 U.S. 443 (1972); and, *Johnson v. Mississippi*, 108 S.Ct. 1981 (1988). However, none of these cases addresses the issue of "custody" in a federal habeas proceedings. Indeed, *none* of the cases cited by Mr. Cook were even federal habeas proceedings; instead, each was decided by this Court on direct review.

Respondent also cites *United States v. Morgan*, 346 U.S. 502 (1954). Yet, *Morgan* also was not a federal habeas proceeding and it did not define "custody". Although the sharply divided *Morgan* court allowed *coram nobis*, impiicit in the court's decision was the idea that had the court viewed the challenge as being pursuant to 28 U.S.C. § 2255,[6] the court would have lacked subject matter jursidiction. *Id.*, at 519 (Justice Minton in dissent); *see also*, *Hirabayashi v. United States*, 828 F.2d 591, 604 (9th Cir. 1987).

Mr. Cook's petition for federal habeas relief challenged his 1958 conviction. J.A.3. Both the district court and the Court of Appeals viewed Mr. Cook's petition as a challenge of his 1958 conviction. Assertions regarding other avenues Mr. Cook may have had to appeal his 1978 conviction are irrelevant in establishing the definition of custody for purposes of a § 2254 proceeding challenging his 1958 conviction.

D. The Washington State Courts' Treatment of Collateral Attacks on Expired Convictions Ensures Repeat Offenders Such as Mr. Cook a Remedy Even Though a Federal Habeas Court May Be Without Subject Matter Jurisdiction As To Some of Their Earlier Crimes.

Respondent correctly notes that Washington law allows an offender, such as Mr. Cook, to challenge an expired state

[5] As discussed above, Washington's use of *prior* convictions is less of an enhancement than a guide to the exercise of discretion in setting a sentence within the maximum term to which the convicted offender is subject. *supra*, p. 4-5.

[6] This section, the counterpart of § 2254 for review of a federal conviction, also has an "in custody" jurisdictional requirement.

conviction when it is used in setting a subsequent state sentence. Brief of Respondent, at p. 30. While this procedure ensures that repeat offenders such as Mr. Cook have a remedy to challenge expired sentences in state court, it does not follow that such persons are "in custody" for purposes of a federal habeas proceeding.

In *State v. Ammons*, 105 Wn.2d 175 (1986), the Washington Supreme Court held that an offender cannot challenge the constitutionality of a prior conviction at the time of sentencing unless the conviction was invalid on its face or had previously been found unconstitutional. *Id.*, 187-88. The offender may however, separately challenge the prior conviction itself by way of a personal restraint petition, pursuant to Washington Rules of Appellate Procedure (RAP) 16.3-16.15.[7] *Id.* If the offender is successful in such a challenge, then he is entitled to a new sentencing. *Id.*, at p 188.

The *Ammons* decision is predicated on use of the prior conviction and in no way affects the jurisdictional "in custody" requirement in a 28 U.S.C. § 2254 proceeding. The *Ammons* procedure ensures that even repeat offenders who, like Mr. Cook have sat on their rights, nonetheless have access to a remedy. In fact, Mr. Cook availed himself of this procedure in 1984 in exhausting his underlying claim. J.A. 4, 5, and 12-14.

Respondent was free to seek direct review, in this Court, of the final decision of the Washington Supreme Court denying his personal restraint petition. Supreme Court Rule 17.1(b)(c). Mr. Cook should not also be rewarded with a fed-

[7] Significantly, the definition of what constitutes "restraint" for purposes of the Washington procedure includes, but is broader than, the "custody" requirement of § 2254. RAP 16.4(b) provides: "A petitioner is under a 'restraint' if the petitioner has limited freedom because of a court decision in a civil or criminal proceeding, the petitioner is confined, the petitioner is subject to imminent confinement, or the petitioner is under *some other disability* resulting from a judgment or sentence in a criminal case." *Id.*, Emphasis added. The "some other disability" standard closely parallels the "collateral consequence" language used by this Court in *Carafas v. LaVallee*, 391 U.S. 234 (1968), in holding that such consequences preclude a habeas challenge began while serving a sentence from becoming moot once the sentence is completed. However, mootness and jurisdiction are different concepts, and while Mr. Cook may be under a "restraint" for purposes of Washington law, he is not "in custody" for purposes of § 2254. Accord, *Cotton v. Mabey*, 674 F.2d 701 (8th Cir. 1982), *cert. denied*, 459 U.S. 1015 (1982).

eral habeas forum in which to litigate his stale claims at this late date when he had twenty (20) years within which to avail himself of a federal habeas remedy. Such an extension of the "in custody" definition would increase "Federal instrusions into state criminal [proceedings and] frustrate both the State's sovereign power to punish offenders and their good faith attempts to honor constitutional rights." *Engle v. Isaac*, 456 U.S. 107, 129 (1982) (Citations omitted).

CONCLUSION

For the reasons discussed above and in Petitioners' opening Brief, the judgment of the Court of Appeals for the Ninth Circuit should be reversed and the matter remanded to the District Court for dismissal for lack of subject matter jurisdiction.

DATED this 17th day of February, 1989.

Respectfully submitted,

KENNETH O. EIKENBERRY
Attorney General

JOHN M. JONES
Assistant Attorney General

WILLIAM L. WILLIAMS
Sr. Assistant Attorney General
Counsel of Record

Corrections Division
Mail Stop: FZ-11
Olympia, WA 98504
(206) 586-1445